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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1951. No. 631.

TURIDDO SIMONI,

Petitioner,

vs.

S. GRILL D'IPPOLITO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Supreme Court of New Jersey is reported in 8 N. J. 271.

JURISDICTION.

The judgment of the Supreme Court of New Jersey was entered on December 10, 1951 (R. 37). The petition for a writ of certiorari was filed on March 6, 1952. The jurisdiction of this court is invoked under 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED.

Where an Italian citizen domiciled in New Jersey dies intestate, leaving nationals of and residents of Italy as sole next of kin, is the Italian Consul absolutely entitled to letters of administration when the New Jersey statute grants discretion to the appointing agency?

Where the Court below has rejected petitioner's request for letters of administration upon the ground that it is not filed upon behalf of the decedent's next of kin, will this Court take jurisdiction upon certiorari?

STATUTE INVOLVED.

New Jersey Revised Statutes 3:7-6 provides:

"If such intestate leaves no relations justly entitled to the administration of his personal estate, or if his next of kin shall not claim the administration within forty days after the death of such intestate, the ordinary or surrogate may grant letters of administration to any fit person applying therefor."

TREATIES INVOLVED.

The Consular Convention between the United States and Italy, Series No. 178, May 28, 1878, provides, Article XVII:

"Consular Officers shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade of the most favoured nation."

The Consular Convention between the United States and Costa Rica, Treaty Series No. 2045, March 19, 1950, provides, Article IX:

* * * * * * * *

"2 (a) In any case where a deceased person leaves property in the receiving state and a legal or equitable interest in such property is held or claimed by a national of the sending state, who is not resident in the

territory of the receiving state and is not legally represented there by any person, the consular officer of the sending state in whose district the estate of the decedent is being administered or, if no administration has been instituted, the property is situated, shall have the right, except as such right may be limited by Section 3 of this article, to represent such national as regards his interests in the estate or property as if valid powers of attorney had been executed by him in favor of the consular officer. If subsequently such national becomes legally represented in the territory of the receiving state and the consular officer is notified to that effect the position of the consular officer will be as if the powers of attorney had become revoked."

* * * * * * * *

"(d) The consular officer shall be permitted to undertake the full administration of the estate whenever and to the same extent as a person, whose interest he represents under subparagraph (a) of this article, would have had the right to administer the estate if he had been present. If by the law of the receiving state a grant by a court is necessary, the consular officer shall have the right to apply for and to receive a grant to the same extent as the person he represents would have had, if such person had been present and applied for it. The court may, however, postpone the making of a grant of administration to the consular officer (with or without the will annexed) for such time as it thinks necessary to enable the person represented by the consular officer to be informed and to decide whether he desires to be represented otherwise than by the consular officer."

STATEMENT.

Flora Casazza, widow, died intestate on December 22, 1950, leaving no next of kin in the United States, her estate consisting of real and personal property. On March 16, 1951, Joseph C. De Marco, who as undertaker, buried decedent, and whose bill for services was unpaid, made application to the Surrogate of Cumberland County for appointment of respondent as Administrator. Notice was served upon Petitioner, the Italian Consul, at Trenton, New Jersey. Petitioner filed a timely application to the Surrogate to be appointed administrator and averred that the decedent left her surviving as next of kin a Luigia Rossi, in Genoa, Italy (R. 34, 35).

Both applications were presented to the Probate Division of the Cumberland County Court, and on July 12, 1951, letters of administration were granted to respondent (R. 34).

It was discovered that Luigia Rossi, upon whose behalf petitioner acted, was not a next of kin of decedent, but that three sisters and a brother are next of kin. Petitioner's petition for letters was never amended to show these facts (R. 34).

On appeal, the Supreme Court of New Jersey, on December 10, 1951, affirmed the judgment appointing respondent administrator (R. 37).

SUMMARY OF ARGUMENT.

1. The petitioner failed to amend his petition for letters of administration so as to aver his representation of the three sisters and brother, the sole next of kin of decedent. The petition for letters of administration upon which petitioner depends avers that he represents one who is not next of kin to the decedent. The Supreme Court of New Jersey rejected the petitioner's request for letters upon this, a non-federal, ground.

2. The Costa Rica Treaty, upon which petitioner depends by virtue of the most favored nation clause of the Italian Treaty, provides that the consular representative shall be permitted to undertake the full administration of the estate whenever and to the same extent as the person whose interest he represents, assumed for this purpose to be the next of kin resident of Italy, would have the right to administer the estate if he had been present. The next of kin under the New Jersey statute for the first forty days after the death of an intestate have the sole right to apply for letters and if they fail to apply it is for the court to appoint, in its discretion, such proper person as will accept it. There is no novel question involved in this case, but the law is well established and has met with the approval of this court.

ARGUMENT.

I. *The decision of the Supreme Court of New Jersey rests upon a non-federal ground.*

The Supreme Court of New Jersey construed the New Jersey Statute (R. S. 3:7-6) to mean that for the first forty days after the death of an intestate the spouse and next of kin have the sole right to apply for letters, and if they fail to apply, it is for the court in its discretion to appoint such proper person as will accept it (R. 34-36).

The Supreme Court of New Jersey stated (R. 34) that more than forty days after the death of the intestate the funeral director made application to the Surrogate of Cumberland County for the appointment of respondent as administrator, that notice of such application was served upon the Italian Consul at Trenton, New Jersey, and that the Italian consul thereupon filed an application in the nature of a cross complaint to be appointed administrator. The court said,

> "This cross complaint charges that Flora Casazza left her surviving as her heir at law and next of kin, Luigia Rossi, a sister residing in Genoa, Italy. It was later discovered that the said Luigia Rossi was not the next of kin, nor one of the next of kin of the decedent, but, as heretofore mentioned, three sisters and a brother are the next of kin. *The record failed to disclose that the cross complaint was amended to show these facts* (R. 34). * * * There are no facts before us which convince us that there was such abuse of discretion by the court below in appointing D'Ippolito as administrator of his estate so as to require a reversal of the order" (R. 36).

Argument

The petitioner was denied relief by the New Jersey Supreme Court because his petition for appointment as administrator was not filed on behalf of the next of kin of decedent. This determination should be given conclusive effect: *De Saussure v. Gaillard*, 127 U. S. 216, 233-234; *Patterson v. Alabama*, 294 U. S. 600.

It is accordingly submitted that the petition for writ of certiorari should be denied.

II. *There is no substantial Federal question.*

Petitioner depends by virtue of the most favored nation clause on the Italian Treaty (Appendix "A" to Petition in Support) upon the treaty with Costa Rica (Appendix "A" to Petition in Support) and refers to Article 9 thereof.

Petitioner contends that because the Costa Rican Treaty, Article IX, paragraph 2(c) provides, inter alia, that the consul has the right to "take possession of the estate or the property" of the deceased national, the right to letters of administration in the consul is thereby established.

But the right to take possession of the estate does not entitle the consul to letters of administration, *Rocca v. Thompson*, 223 U. S. 317.

As a matter of fact it is obvious, upon reading the Costa Rica Treaty, that it was not intended that the grant of the right to take possession was to include the right to letters of administration. The right to letters of administration is covered by Article IX, paragraph 2(d), and it is therein stated:

> "The consular officer shall be permitted to undertake the full administration of the estate whenever and to the same extent as a person whose interest he represents, sub-paragraph (a) of this article would have had the right to administer the estate if he had been present."

Reference to sub-paragraph (a) of Article IX, paragraph 2, shows that in this case the persons whose interest petitioner represents are the next of kin, nationals and residents of Italy who hold an interest in the estate of the decedent.

Since the Consular Officer's rights to letters of administration are the same as the next of kin, the Consular Officer is bound by the same forty day provision under the New Jersey Statute as were the next of kin, and having failed to apply for letters of administration within such forty day period, it was for the Court in its discretion to appoint such proper person as it chose and would accept the grant.

Viewing the Costa Rican treaty in the proper light, there is no novel question presented in the petition. It is the same question as arose under the treaty with Sweden of 1911, where the language was "so far as the laws of each country will permit." This was construed not to require the appointment of the foreign consul as administrator, but to subject the foreign consul to the provisions of the state laws: *Matter of D'Adamo,* 212 N. Y. 214, 106 N. E. 81 (opinion by Cardoza, J.); cases collected in 100 A. L. R. 1527, 1531; *Schneider v. Hawkins,* 179 Md. 21, 16 A. 2d 861; *Lely v. Kalingolu,* 76 F. 2d 983, Cert. den. 295 U. S. 765.

In *Santovincenzo v. Egan,* 284 U. S. 30, this Court, per Hughes, C. J., referred with approval to the decision in *Matter of D'Adamo,* supra, and said:

> "We are not here concerned with questions of mere administration, nor is it necessary to determine that the loose phrasing of the provisions of Article VI precludes an appropriate local administration to protect the rights of creditors."

It is submitted that the Treaty with Costa Rica advances the rights of foreign consular officers no further than the Treaty with Sweden.

It is submitted that since there is not a substantial question involved, the petition for certiorari should be denied: *Hass v. New York*, 338 U. S. 803.

CONCLUSION.

It is submitted that it has been established that the Supreme Court of New Jersey rendered judgment against petitioner because petitioner had not applied for letters of administration upon behalf of decedent's next of kin.

It is further submitted that the question presented with respect to the rights of foreign consul to letters of administration upon estates of deceased nationals under the Costa Rican treaty renders no novel question that this Court should hear.

It is accordingly submitted that the petition for certiorari should be denied.

Respectfully submitted,

EDWIN J. McDERMOTT,
Attorney for Respondent.